a

NG AH HO

v.

HONG LEONG FINANCE BHD.

HIGH COURT MALAYA, KUALA LUMPUR
b RK NATHAN JC
[CIVIL SUIT NO: D5-22-905-1991]
30 NOVEMBER 1996

c ***CIVIL PROCEDURE:*** *Damages - Claim for damages - Plaintiff alleging that he was wrongly made a bankrupt - Whether claim in contract or in tort - Pleadings - Whether defective - Whether contained material particulars - Whether projected plaintiff's case with clarity - Whether maintainable cause of action disclosed on the pleadings*

d ***CIVIL PROCEDURE:*** *Damages - Claim for damages - Plaintiff wrongfully made a bankrupt - Defendant admitting plaintiff made a bankrupt by mistake - Whether cause of action lies in law for mistake or negligent action done in Court proceedings - Whether injury caused to party or witness a relevant consideration - Whether plaintiff's action maintainable on grounds of malicious prosecution - Whether there was abuse of process*
e *of Court*

CIVIL PROCEDURE: *Damages - Claim for damages - Parties by consent agreeing that Court hears submissions on the issue of liability - Effect of consent - Whether consent can be withdrawn at later stage*

f The defendant had commenced proceedings against the plaintiff as a guarantor and in consequence thereof presented a bankruptcy petition against the plaintiff. The action was compromised by the plaintiff paying a lesser sum to the defendant as full and final settlement in return for which the defendant agreed to withdraw all legal proceedings against the plaintiff.

g The plaintiff alleged that in breach of the agreement the defendant proceeded to obtain adjudication and receiving orders against the plaintiff. In the premises the plaintiff claimed that he was wrongfully made a bankrupt and sued the defendant for damages.

h The defendant admitted that the plaintiff was wrongfully made a bankrupt but contended that it was a mistake. The defendant further contended that as soon as it was aware of the mistake it had taken all reasonable steps to rectify the same. In the circumstances the defendant argued that the plaintiff's action was misconceived in law and irregular and ought to be struck out accordingly.

i

At the commencement of the trial both parties, by consent, agreed that the issue of liability only be argued and the trial proceeded on this basis. During the trial the question arose whether the consent so given could be withdrawn at a later stage of the proceedings.

Held:

[1] Both paries had overlooked the bankruptcy proceedings in their negotiations as it can be seen from the exchange of letters that no mention was made of the bankruptcy proceedings. Had the intention to withdraw the bankruptcy proceedings been part of the agreement reached, the plaintiff's solicitors would have mentioned that in their letter and subsequently would have reminded the defendant's solicitors when the latter only sent the notice of discontinuance of the civil suit and did not take any other action to discontinue the bankruptcy proceedings. In the circumstances it was clear that there was no breach of agreement nor a breach of duty on the part of the defendant.

[2] There was no evidence of malice on the part of the defendant. The fact that the defendant promptly applied to annul and rescind the adjudication and receiving orders it inadvertently obtained is proof that there was no malice intended. In the circumstances the plaintiff has failed to demonstrate any existing cause of action on which he can rely.

[3] Since neither malicious prosecution no the tort of abuse of process of the Court had been pleaded by the plaintiff nor elicited from the pleadings, the plaintiff's claim is not grounded upon any accepted cause of action and must necessarily fail.

[4] Where a concession had been made as to the conduct of a hearing or proceeding in Court and the Court had proceeded to act on that concession and had heard submissions it is not proper for Counsel to backtrack on his concession. If, however, an admission had been wrongly made to the Court then it is possible for Counsel to so indicate to the Court and to apply to retract the admission and it is for the Court to consider that application and make a just order.

[Plaintiff's claim dismissed with costs.]

Cases referred to:

In re Keet [1905] 2 KB 666 ***(refd)***
Kwong Yik Bank Bhd. v. Hah Chiew Yin [1985] 2 MLJ 452 ***(refd)***
Bailey (Trustee) v. Johnson [1873] 27 LT 714 ***(refd)***
Chop Chye Hin Chong v. Ng Yeok Seng [1934] SSR Vol. 3 MLJ 265 ***(refd)***

Ing Chiat v. A.B. Nicholas [1934] MLJ 251 ***(refd)***
The Quartz Hill Consolidated Gold Mining Company v. Eyre [1883] 11 QBD 674 CA ***(refd)***
In Stapeley v. Annelts [1970] 1 WLR 70 ***(refd)***
Business Computers International Ltd. v. Registrar of Companies and Others [1987] 3 WLR 1134 ***(refd)***
Rondel v. Worsley [1967] 3 AER 993 ***(refd)***
Johnson v. Emerson & Sparrow [1871] VI LR 329 ***(refd)***
Matsushita Greatwall Corporation Pte Ltd. v. KKBI Manufacturing Sdn. Bhd. & Another Case [1996] 2 CLJ 901 ***(refd)***
Tilling v. Whiteman [1979] 2 WLR 401 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 33, 105
Bankruptcy Act 1883 [UK], s. 35
Rules of the High Court 1980, O. 33

Other source referred to:
Law of Torts, Salmond and Heuston, 20th Edn., p. 411
Malaysian Court Practice 1995, para. 33.2.3

For the plaintiff - G.F. Nelson (K.K. Tan with him); M/s. Tan Kok Kwang & Co.
For the defendant - Dr. C. Das (Romesh Abraham & C.M. Teng with him); M/s. Shook Lin & Bok

JUDGMENT

RK Nathan JC:

Background Facts

At the commencement of the trial both Counsel by consent asked that I record a set of material dates on which acts agreed to by both parties were done. Parties then by consent further agreed that I hear submissions on the issue of liability only based primarily on legal arguments as averred in para. 17 of the defence which reads as follows:

> 17. The defendant contends that the action herein is misconceived in law and irregular and ought to be struck out accordingly.

There were to be no witnesses at the trial. This preamble is important because of what transpired during the submission.

The defendant finance company commenced proceedings against the plaintiff, who was a businessman and a guarantor, at the Kuala Lumpur High Court *vide* Civil Suit No: 1337 of 1982 on 26 August 1982 to recover a sum of RM36,210.85 with interest and costs and obtained judgment for the said sum.

On or about 3 July 1986 the defendant presented a creditor's petition against the plaintiff in the Kuala Lumpur High Court *vide* Bankruptcy No: 43-225-86 in consequence of the plaintiff's failure to pay or settle the said judgment sum (hereinafter called "the bankruptcy proceedings"). By a letter dated 19 April 1988 the defendant agreed to accept a sum of RM14,754.72 in full and final settlement of the defendant's claim against the plaintiff to be paid by the plaintiff to the defendant not later than on 24 April 1988. The defendant agreed that upon payment of the said sum the defendant would withdraw all legal proceedings against the plaintiff. The said sum of RM14,754.72 was paid to the defendant's solicitors on 20 April 1988 and a receipt dated 3 May 1988 for the said sum was issued to the plaintiff by the defendant's solicitors. However the plaintiff contended that in breach of the aforesaid agreement the defendant obtained the adjudication and receiving orders (hereinafter referred to as "AORO") against the plaintiff on 11 August 1988. Alternatively the plaintiff contended that the defendant was under a duty to the plaintiff to ensure that all legal proceedings, in particular, the bankruptcy proceedings were withdrawn against the plaintiff, and further contended that the defendant also failed to timeously take steps to set aside the AORO. By a notice of motion dated 12 August 1988 the defendant's solicitors applied to annul and rescind the AORO and obtained the order on 17 November 1988. The plaintiff did not know that the AORO had been made against him and neither did the defendant inform the plaintiff of the AORO.

However notwithstanding the fact that the defendant had annulled the AORO on 17 November 1988 the defendant did not take any further steps to extract or serve the AORO on the appropriate parties. The plaintiff himself extracted the AORO on 5 September 1990 and served the AORO on the office of the Official Assignee. The defendant's solicitors wrote on 25 September 1990 to the plaintiff enclosing a letter dated 14 September 1990 from the Official Assignee's office stating that action had been taken to annul and rescind the AORO and further confirmed that the plaintiff was no longer a bankrupt with effect from 17 November 1988. The defendant thus contended that it had taken all necessary and timeous steps and offered their apologies for any inconvenience caused.

The defendant further contended that the Official Assignee was present at the Kuala Lumpur High Court on 17 November 1988 at the hearing of the application to annul the AORO and had no objection to the said application. The defendant also argued that it was the function of the Official Assignee who was present in Court and who had consented to the said annulment, to rectify his records as registrar of bankrupts by removing and/or deleting the name of the plaintiff if it had been entered therein. The defence raised three issues.

(1) No Maintainable Cause Of Action On Pleadings

Dr. Das argued that the cause of action as pleaded did not give rise in law to any maintainable cause of action against the defendant. The thrust of his argument was that the annulment of the AORO had wiped out the act of bankruptcy and thus gave rise to no cause of action except for malicious prosecution. The defence argued that there was a debt when the creditor's petition was filed on 3 July 1986. The mistake occurred in that the creditor's petition was heard on 11 August 1988 when the debt had already been settled on 20 April 1988 and on the very next day, that is, on 12 August 1988 the defendant had applied to rescind the AORO. As against these facts the plaintiff's claim is based on a breach of agreement by the defendant. The agreement is contained in the letter dated 19 April 1988 (earlier referred to) wherein the defendant agreed to accept the sum of RM14,754.72. By a letter dated 4 May 1988 (Exh. PBD 6) the defendant wrote to the plaintiff confirming withdrawal of legal proceedings against him and indeed the said legal proceedings were withdrawn in that the defendant had filed a notice of discontinuance against the plaintiff (Exh. DBD 4-5). The defendant thus submitted that the agreement that it is said to have allegedly breached, did not give rise to any cause of action for mistakenly obtaining the AORO unless the plaintiff was able to show malicious prosecution or that the plaintiff was able to rely on the tort of abuse of process of the Court. In para. 14 of the statement of claim the plaintiff claims as follows:

> 14. By reason of the matters abovesaid the plaintiff has suffered great distress and embarrassment and suffered loss and damage. The plaintiff will rely on the aforesaid facts and matters to support his claim for aggravated damages.
>
> And the Plaintiff claims:
>
> (a) general and aggravated damages;
>
> (b) interest at such rate and for such period as this Honourable Court deems fit:

With reference to para. 14 the defence contended that it would seem to be a claim in tort as there was a claim for general damages in addition to aggravated damages. This, argued the defence, was not a claim in contract. The alternative claim resting on a breach of a duty of care seems to suggest a cause of action in negligence. It was submitted that no defendant ought to be put to any difficulty or disadvantage as a result of the plaintiff not identifying the cause of action.

In reply Mr. Nelson submitted that more than relying on legal principles he would rely on factual situations to prove his case. In the statement of claim the plaintiff had referred to an agreement that had been breached. This indicated that the plaintiff was relying on contract. The plaintiff contended that the defendant had breached two undertakings. Firstly when the plaintiff's solicitors forwarded the cheque for RM14,734.22, the said solicitors had asked for an undertaking that the defendant would withdraw all civil proceedings (Exh. DBD pp. 1-2). Secondly, the defendant had written a letter to the plaintiff (Exh. PBD p. 6) that in consideration of the plaintiff having paid the said sum the defendant would withdraw legal proceedings against him. To a request from the Court as to whether both the undertakings were not the same, Mr. Nelson readily agreed they were. Whilst contending that there had been a breach he conceded that particulars of damage had not been set out in the statement of claim.

As to whether there was a maintainable cause of action to be gathered from the pleadings, I must say that whilst no Court expects a statement of claim to be the nonpareil of perfection it must contain material facts with sufficient details so as to succinctly and with clarity project the plaintiff's case. Neither the defendant nor the Court ought to be put in the position of Hansel and Gretel of the fairy-tale series, looking for fallen crumbs as a guide to find their way out of the woods. From a reading of the pleadings I am unable to conclude whether the plaintiff is launching an action based on the law of contract or tort. In para. 10 of the statement of claim the plaintiff relies on a breach of the agreement and thus a possible case is for breach of contract whereas the alternative prayer in para. 11 of the statement of claim alludes to a breach of the duty owed to the plaintiff by the defendant, thus verging on the law of tort. The plaintiff stated that the particulars of breach are as set out in para. 12:

(a) applying for and obtaining a receiving and an adjudicating order against the plaintiff on 11 August 1988;

(b) failing to take adequate or any step to withdraw the bankruptcy proceedings;

(c) failing to ensure that the bankruptcy proceedings on 11 August 1988 was withdrawn against the plaintiff.

In order to at least see if the claim may succeed, I considered the particulars abovementioned to see if there was a basis for this action.

In the plaintiff's solicitors' letter to the defendant's solicitors dated 20 April 1988, the following were to be undertaken by the defendant's solicitors:

(a) ... to withdraw all Civil Proceedings against the company, namely Khai Poh Tin Mine and the five guarantors;

(b) ... to lift the Prohibitory Order lodged under our client's (Ng Ah Ho) property held under HS(D) 3445 for Lot No: TLO 2374 situated in the Township of Bandar Maharani, Muar, Johore.

Subsequent to this letter, the defendant's solicitors by letter dated 4 May 1988 sent three copies of notice of discontinuance of the Kuala Lumpur High Court Suit No. C 1387 of 1982 to the plaintiff's solicitors for their execution, after which the same were returned by letter dated 21 May 1989. It can be seen from the exchange of letters between the two parties that no mention was made of the bankruptcy proceedings. It seems to me that both parties had overlooked the bankruptcy proceedings. Had the intention to withdraw the bankruptcy proceedings been part of the agreement reached, the plaintiff's solicitors would have mentioned that in their letter dated 20 April 1996 and subsequently would have reminded the defendant's solicitors when the latter only sent the notice of discontinuance of the civil suit and did not take any other action to discontinue the bankruptcy proceedings. I am therefore inclined to hold that there was no breach of agreement nor a breach of duty.

If the plaintiff is making his claim for malicious prosecution then the same ought to have been pleaded. Malice connotes evil intention and shows a determined mind to act, not in the best interest of the opponent. Since no one can read the mind of another, the law will accept a plea of malice if existence of malice can be demonstrated by inferences or by the conduct of a party and thus in the absence of reasonable and probable cause the Court can infer malice.

What was the conduct of the defendant? It admits inadvertence. It admits that on 11 August 1988 it had obtained the AORO but it had demonstrated that the very next day on 12 August 1988 it applied to annul and rescind the said orders. I cannot infer malicious intent by such prompt conduct. The speed with which the defendant acted in applying to annul and rescind the AORO it inadvertently obtained immediately upon realising its mistake, is proof that there was no malice intended.

Further it cannot be denied that the bankruptcy proceedings were indeed commenced when the debt was due. In sieving through the evidence presented by the plaintiff to see if there is any malice on the part of the defence it is proper for me at this stage to consider the distinction between s. 33 and s. 105 of the Bankruptcy Act 1967 (the Act):

33. Discharge of bankrupt.

(1) A bankrupt may at any time after being adjudged bankrupt apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application.

(2) (Deleted by Act A827).

(3) On the hearing of the application the Court shall take into consideration a report of the Official Assignee as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

(The other subsections are not relevant for the present case.)

In so far as s. 33 goes it is the bankrupt who applies to Court for an order of discharge and upon the hearing of the application the report of the Official Assignee relating to the bankrupt's conduct is placed before the Court. The defendant in the instant case did not allow for the plaintiff to be put in this situation. In fact the defendant acted under s. 105 which reads:

105. Power of Court to annul adjudication in certain cases.

(1) Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, or where it appears to the Court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the Court may annul the adjudication.

...

(5) When the Court annuls an adjudication under this section it shall also rescind the receiving order.

(The other sub-ss. (2), (3) and (4) are not relevant for the present case.)

As was said *In re Keet* [1905] 2 KB 666 an annulment order wipes out the bankruptcy altogether. Stirling LJ said at p. 676:

> ... He is not applying for an order of discharge, but he is applying for an order of annulment under s. 35, which provides that "where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court

> may, on the application of any person interested, by order, annul the adjudication" – that is to say, wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication.

(Section 35 of the English Bankruptcy Act 1883 is similar to s. 105 of the Act.) These words were repeated by Seah FJ in *Kwong Yik Bank Bhd. v. Hah Chiew Yin* [1985] 2 MLJ 452 when his Lordship said:

> It is pertinent to observe that the bankrupt was not applying for an order of discharge but was applying for an order annulling her adjudication. The effect of this is to wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication order (per Stirling LJ in *In re Keet*).

In fact long before *In re Keet*, it was held in *Bailey (Trustee) v. Johnson* [1873] 27 LT 714 at 717 by the Court of Exchequer that the effect of an annulment order was:

> ... to remit the bankrupt, at and from the very moment that the adjudication of his bankruptcy is annulled, to all his original powers, privileges, and rights in respect of all his property, including therein this sum of money.

The defence drew a distinction between a bankrupt being discharged and an annulment of the AORO and submitted that for all intents and purposes the plaintiff was never considered a bankrupt at all as all his rights and privileges had been restored. The defendant further contended that by virtue of s. 74 of the Act the Official Assignee and any person acting under his directions or control had been given immunity.

In the circumstances the plaintiff has failed to demonstrate to me any existing cause of action on which he can rely.

It is now necessary to consider s. 74 of the Act which reads:

> 74. Protection of Official Assignee and person acting under his direction or control.
>
> The Official Assignee or any person acting under his direction or control shall not be liable personally in any action or proceeding in respect of anything done or intended or omitted to be done under this Act but any person aggrieved by anything so done or intended or omitted to be done may apply to the Court for directions in the matter and the Court may thereupon give such directions or make such order as it thinks fit.

It seems to me that pursuant to this section only the Official Assignee or persons acting under the directions of the Official Assignee are protected from a suit of this nature. Hence, this provision would not afford the defendant any

protection, neither is the section applicable as the Official Assignee was not made a party to this suit.

(2) No Cause Of Action Lies In Law For A Mistake Or Negligent Act Done In Court Proceedings Although Injury May Be Caused To A Party Or Witness

In submitting on this issue the defence relied on a passage from *Salmond and Heuston on the Law of Torts* (20th Edn.) at p. 411:

> ... So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability; and, conversely, if there are reasonable grounds for the proceedings (for example, the probable guilt of an accused person) no impropriety of motive on the part of the person instituting these proceedings is in itself any ground of liability. Therefore it is necessary to distinguish between honesty of belief and honesty of motive; the former is relevant to the question of reasonable and probable cause, the latter to the question of malice. (*Horner v. Irwin & Son Ltd.* [1972] NI 202, 204)

The learned authors go on to consider what happens if proceedings are erroneous or irregular. At p. 413 they say as follows:

> Having considered the liability of litigants for the malicious abuse of legal process, it remains to consider how far they are responsible for mere errors and irregularities of procedure in the absence of any malice. The rule is that no action will lie against any person for procuring an erroneous decision of a Court of justice. This is so even though the Court has no jurisdiction in the matter and although its judgment or order is for that or any other reason invalid. A Court of justice is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the Court commits. Every party is entitled to rely absolutely on the presumption that the Court will observe the limits of its own jurisdiction and decide correctly on the facts and the law ([1848] 12 QB 871). But a party who has actually misled the tribunal by his fraud or malice may be liable, and there is even authority for saying that one who prefers a charge to a magistrate (even though in vague language and by way of suspicion) is liable for the ulterior consequences and may not say they were due to the mistake or indiscretion of the tribunal he has set in motion (*Fitzjohn v. Mackinder* [1860] 8 CB (NS) 78).

The defence strongly contended that it was the duty of the plaintiff to show a clear distinction between a mere mistake and conduct actuated by malice. In so far as the present pleadings of the plaintiff were concerned it was submitted that there was not even a remote suggestion of a cause of action based on malicious prosecution. In fact malice was not even averred. Dr. Das referred me to *Chop Chye Hin Chong v. Ng Yeok Seng* [1934] SSR Vol. 3 MLJ 265 where Shaw CJ said at p. 266:

> It is a well established principle both with regard to civil and criminal matters that a person is not liable in damages for putting the law in motion unless he is actuated by malice. It is the right of everyone to put the law in motion if he does so with the honest intention of protecting his interests but it is an abuse of that right if he proceeds maliciously and without reasonable and probable cause for anticipating success. An example of this will be found in the difference that exists between an action for wrongful arrest and one for malicious prosecution. In the case of the first, where a man acts on his own initiative, proof of malice is not necessary to give a right to recompense by damages. In the case of the second, where the interposition of the Court is obtained, malice must be established. An example may again be found in the form of an action for abuse of ordinary civil process. Malice and absence of reasonable and probable cause must again be proved in the same manner as in an action for malicious prosecution (*Mitchell v. Jenkins* 5 B. & Ad. 588). The case of wrongfully obtaining the issue of a writ of extent in England is perhaps as closely analogous to wrongfully obtaining the issue of a distress warrant under our law as can possibly be obtained. Authority to issue such a writ, which is a special remedy for the recovery of Crown debts, is obtained on application to the Court on affidavit very similar to the application for a distress warrant under our Civil Procedure Code. Although damages may be obtained for maliciously issuing such writ, (see *Craig v. Hasell* 4 Q.B. 481) damages cannot be recovered for the mere wrongful issue of the writ without malice, (see *Pridgeon v. Mellor* 28 TLR 261) the reason being, as stated in the latter case, that there is a judicial determination interposed between filing of the affidavit on which the writ is issued and the issue of the writ, and the issue of the writ is in consequence of that interposition and therefore persons acting without malice are protected.

This was a case of distress done erroneously. The landlord believed that two months' rent was due whereas only one month rent was in arrears and the tenant had actually tendered the amount actually due. Yet the Court of Appeal reversed the decision of the trial Judge on the basis that the tenant had failed to show proof of malice on the part of the landlord.

(3) The Only Recognised Actions In Law Are Malicious Prosecution And The Tort Of Abuse Of Process Of The Court

It was submitted by the defence that malicious prosecution included malicious arrest or malicious execution. The defence argued that if the plaintiff herein did not base his cause of action either on malicious prosecution or on the tort of abuse of process of the Court, he has no cause of action recognisable in law although he may have suffered injuries. It was submitted that this protection is given to parties involved in legal proceedings in the larger public interest and that the most important ingredient for the maintainability of either of these two causes of action was the element of malice. The Court ought to be satisfied that the proceedings were maliciously instituted or proceeded with. In the present case there was in existence a debt when the institution of the

bankruptcy proceedings was commenced. As soon as the mistake that the debt had been settled, was discovered, the defendant promptly and without delay took steps to annul the adjudication order and to rescind the receiving order. No element of malice had been shown in this case. The defendant contended that the plaintiff should not be permitted to disguise his case either as a breach of contract or as a breach of a duty that is in tort, if he does not plead the essential ingredients of these two recognised causes of action. The defendant submitted that breaches of the agreement or of a duty may be a factor or evidence of malice but it did not excuse a plaintiff from having to put his action in malice and to prove it.

In response to the second and third grounds relating to tortious liability Mr. Nelson submitted that the plaintiff had adduced sufficient facts to show that the defendant had instituted judicial process without reasonable or probable cause. Counsel referred me to *Ing Chiat v. A.B. Nicholas* [1934] MLJ 251 and submitted that in that case where there was attachment before judgment the Court held that that was tantamount to malicious prosecution. Mr. Nelson contended, relying on *Ing Chiat* that without reasonable and probable cause the defendant went ahead with the bankruptcy proceedings. When questioned by the Court as to whether the plaintiff had pleaded that the act was done without reasonable and probable cause, Mr. Nelson admitted that it had not. I was also referred to *The Quartz Hill Consolidated Gold Mining Company v. Eyre* [1883] 11 QBD 674 CA where at p. 684 Brett MR said:

> ... It seems to me that an action can be maintained for maliciously procuring an adjudication under the Bankruptcy Act 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can show that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer a pecuniary loss. That seems to be the ground upon which Cleasby, B., supported the action in *Johnson v. Emerson* (Law Rep. 6 Ex. 329, at p. 310), and I think that his view was right. By proceedings in bankruptcy a man's fair fame is injured just as much since the Bankruptcy Act 1869, as it was before, because he is openly charged with insolvency before he can defend himself.

Relying on this passage the plaintiff contended that their action was maintainable so long as the defendant herein had proceeded in bankruptcy.

It is my judgment in respect of ground 2 that no action lies for the commencement of legal proceedings, unless they have been instituted without reasonable and probable cause. It is obvious therefore that the burden of proving absence of reasonable and probable cause is on the plaintiff. One can imagine the quandary the plaintiff has put himself in because the plaintiff has indeed taken upon himself the task of proving a negative. In *Stapeley v. Annelts*

[1970] 1 WLR 70 the Court held that if a plaintiff denies an allegation it is not the practice to require him to give particulars of his denial. The plaintiff based his argument on the absence of reasonable and probable cause on the part of the defendant. But other than merely referring to *Ing Chiat* the plaintiff adduced no evidence to discharge the burden imposed on him that the action was instituted without reasonable and probable cause. Indeed the plaintiff even conceded that he had not even pleaded the absence of reasonable and probable cause.

In my view reasonable and probable cause means a genuine belief, based on reasonable grounds, that the proceedings are justified. The defendant must actually and honestly believe in his cause. But this genuine belief must be entrenched on reasonable grounds. As to whether the grounds are reasonable is a matter of fact resting on the evidence adduced. But it is abundantly clear that no action will lie for the commencement of legal proceedings, even in the absence of reasonable and probable cause unless such an action is instituted maliciously. Both malice and the absence of reasonable and probable cause must co-exist if the plaintiff is to establish liability against the defendant. I totally accept the passage from *Salmond and Heuston (supra)* at p. 411 quoted by the defendant to the effect that so long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability. But it ought to be borne in mind that when the bankruptcy proceedings were commenced the plaintiff was still indebted to the defendant. There can never be any malice in any event. In *Business Computers International Ltd. v. Registrar of Companies and Others* [1987] 3 WLR 1134 Scott J said at p. 1138:

> It is implicit in the decision that the commencement of bankruptcy proceedings or the presentation of a winding up petition cannot found an action in damages unless associated with malice.

In that case the alleged negligence was negligence in the presentation and prosecution of a winding-up petition. The Court held that negligence by itself did not suffice. A tortious duty of care was not owed by one litigant to another unless associated with malice. Obviously the rationale behind this set principle must be that without this caveat an honest litigant might not dare to bring a claim for fear that if he loses he might be sued for damages. Indeed in *Rondel v. Worsley* [1967] 3 AER 993 HL Lord Pearce said at p. 1024:

> The legal process inevitably creates hardships and it is not always easy to see what is the right balance. In attempting to do so one must regard the interrelation of the various parts. It is a hardship that a man who has done no wrong should be subjected by a plaintiff to a baseless charge, in meeting which he will incur large expense. The charge may be reported largely in the newspapers and injure

> his reputation. ... But the basic hardship is inevitable and will always remain, namely, that any plaintiff can use the legal machine as a sounding board for untruthful allegations and cause harm, trouble and expense to an innocent defendant, and yet the law holds him (and the press who report the case) immune from paying damages for their untruth. Yet to remove this immunity would create a great injury to justice. Without it, the honest litigant might not dare to bring an honest claim for fear that if he fails he might be sued for damages.

Both Counsel relied on *The Quartz Hill Consolidated Gold Mining Company v. Eyre* [1883] 11 QBD 674 CA and it therefore became necessary to look closely into the facts of that case. The defendant, who had been a shareholder in the plaintiff company, instructed certain brokers to sell his shares, and signed a transfer. The brokers informed him that they could not sell the shares, but the transfer was not returned to him. After waiting ten or eleven days he presented a petition to wind up the company on the ground of fraud in its formation, and of the impossibility that it could carry on business at a profit. At the time of presenting the petition the company, which was a trading company, had property of a large amount, and its debts were trifling. The defendant was not then in fact a shareholder. His shares had been sold, and the transfer had been registered. Upon discovering that his shares had been sold, he gave notice that the petition would be withdrawn, and it was ultimately dismissed without costs. The company having brought an action for falsely and maliciously and without reasonable or probable cause presenting the petition, at the trial no proof of damage to the company was given beyond the liability to pay its own costs of defending itself against the petition; and upon this ground the company was nonsuited at the close of its case.

The Court of Appeal held that the nonsuit was wrong and the opinion of the jury ought to have been taken whether the defendant had been actuated by malice.

As I had earlier on held that there was no malicious intent on the part of the defendant due to its prompt conduct and its own admission of inadvertence and apology for the error made, and since the facts in the instant case differ greatly from that case the decision of Brett MR at p. 684, relied upon by the plaintiff in isolation to the rest of his judgment cannot be held to be applicable in this case.

I now have to consider the third ground. In *Johnson v. Emerson & Sparrow* [1871] VI LR 329 the Court found that the defendant had falsely and maliciously and without reasonable and probable cause filed a petition in bankruptcy against the plaintiff and caused him to be adjudged bankrupt when the defendant knew that the proceedings in bankruptcy had been stayed until an appointment had been made by the registrar for the examination of sureties

and execution of a bond. I had in *Matsushita Greatwall Corporation Pte Ltd. v. KKBI Manufacturing Sdn. Bhd. & Another Case* [1996] 1 AMR 1003 considered both malicious prosecution and abuse of the process of Court and I can do no better than repeat what I had said on this at p. 1021:

> Where a legal process, the basis for which in itself could have proper foundation, has been perverted to satisfy some other motive such as extortion or oppression an action will lie at the feet of a party that suffers the wrong. This is the tort of abuse of process. Unlike the tort of malicious prosecution the tort of abuse of process does not depend on the wrongful procurement of the legal process but in the misuse of the process however correctly it was obtained.

Therefore since neither malicious prosecution nor the tort of abuse of process of the Court had been pleaded by the plaintiff nor elicited from the pleadings the plaintiff's claim is not grounded upon any accepted cause of action and must necessarily fail. Hence, I accept the submission of the defence on this ground.

There is one other matter for consideration. At the conclusion of his submission Mr. Nelson submitted that there was a House of Lords case that frowned upon this approach of deciding the issue of liability by way of submissions, rather than proceeding under O. 33 of the Rules of the High Court 1980 (RHC). He then referred me to Malaysian Court Practice 1995 para. 33.2.3. and relied on the above referred House of Lords case, namely *Tilling v. Whiteman* [1979] 2 WLR 401 which states that preliminary points of law have been described as too often treacherous short cuts and their price can be delay, anxiety and expense.

Dr. Das in reply said that both parties had at the commencement asked the Court to try the issue of liability on a split trial basis, that is, to decide the issue of liability and if liability is found, to try the issue relating to damages. I then pointed out to Mr. Nelson that it was by consent that both Counsel had asked me to proceed on that basis and that whether it was open to Counsel at this stage to go back on his earlier agreement. I also asked Mr. Nelson if he wanted me to make a ruling on this issue to which he replied that it was not necessary.

On the issue taken by Mr. Nelson and his view that the question of liability ought to have proceeded under O. 33 of the RHC instead of being taken by way of submission since he did not wish that I make a ruling I shall take it that he was not seriously pursuing any objection on this score. In any event I will say categorically that whilst a wide discretion is given to the Court to decide on the manner in which it is to conduct a trial it can only do so with the assistance and cooperation of Counsel. It is the paramount duty of Counsel

to consider well before making admissions or concessions either to opposing Counsel or to the Court. Once done and the Court, based on such concession, undertakes a course of action precipitated by that concession then it is improper for Counsel to address the Court against the propriety of taking such a course of action without retracting his earlier concession. If an admission had been wrongly made to the Court then it is possible for Counsel to so indicate to the Court and to apply to retract the admission and it is for the Court to consider that application and make a just order.

But where a concession had been made as to the conduct of a hearing or proceeding in Court and the Court had proceeded to act on that concession and had heard submissions it is not proper for Counsel to back-track on his concession.

I therefore dismissed the plaintiff's claim with costs.

Reported by Satish Nair